Supreme Court, U.S.
FILED
NOV 15 2006
OFFICE OF THE CLERK

No. _____

06-695

In The

# Supreme Court of the United States

ROBAMA ABED and MARY ABED,

*Petitioners,*

v.

MARY K. HIGGINS as Independent Executrix of the Estate of J. MARLON HIGGINS, also known as JAMES M. HIGGINS, RUSTY HIGGINS and JAMES MARLON HIGGINS,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Court Of Appeals For The State Of Colorado**

## PETITION FOR A WRIT OF CERTIORARI

ROBAMA ABED, Pro Se
MARY ABED, Pro Se
*Petitioners*
3893 South Quince Street
Denver, CO 80237
(303) 770-4667

## QUESTION PRESENTED

Whether the Colorado Courts violated the Petitioners' right to a jury trial as provided by the rules of the common law and as guaranteed by the United States Constitution pursuant to Amendment VII and Amendment XIV, in that the Colorado Courts sanctioned the violation of jury secrecy by allowing an alternate juror, a stranger to the jury proceedings, to participate in reaching a verdict in which the petitioners were plaintiffs and Respondent was defendant.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| STATUTES INVOLVED | 1 |
| STATEMENT OF THE CASE | 2 |
| REASONS FOR GRANTING THE PETITION | 3 |
| CONCLUSION | 7 |

# TABLE OF AUTHORITIES

Page

CASES

Gideon v. Wainwright, 372 U.S. 335 (1963) ..... 6

Lloyd v. Dollison, 194 U.S. 445, 24 S.Ct. 703, 48 L.Ed. 1062 (1904) ..... 6

Mapp v. Ohio, 367 U.S. 643 (1961) ..... 5

National Equipment Rental v. Hendrix, 565 F. 2d 255 (2d Cir. 1977) ..... 5

Pearson v. Yewdall, 95 U.S. 294, 5 Otto 289, 24 L.Ed. 436 (1877) ..... 6

People v. Boulies, 690 P. 2d 125 (Colo. 1984) ..... 5

People v. Burnette, 775 P. 2d 583 (Colo. 1989) ..... 5

United States v. Beasley, 464 F. 2d 468 (10th Cir. 1972) ..... 4

United States v. Brown, 823 F. 2d 591 (D.C. Cir. 1987) ..... 4

United States v. Olano, 507 U.S. 725 (1993) ..... 4

United States v. Thomas, 116 F. 3d 606 (2d Cir. 1997) ..... 4

United States v. Symington, 195 F. 3d 1080 (9th Cir. 1999) ..... 4

United States v. Virginia Erection Corp., 335 F. 2d 868 (4th Cir. 1964) ..... 4

Walford v. Blinder, Robinson & Co., Inc., 739 P. 2d 620 (Colo. App. 1990) ..... 5

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

Amendment VII .....1, 2, 5, 6

Amendment XIV .....1, 2, 5, 6

COLORADO STATUTES

C.R.S. 13-71-103..... 1

C.R.S. 13-71-142..... 2

## OPINIONS BELOW

The Unpublished Opinion of the Colorado Court of Appeals in that Court's Case No. 04CA1268, announced March 30, 2006, affirming the judgment of the District Court of the City and County of Denver, Colorado in Case No. 02 CV 4629 is printed at Appendix to the Petition, "A". Order denying Petition for Rehearing by the Colorado Court of Appeals, dated June 1, 2006, is printed at Appendix to Petition "B". Order denying Petition for Writ of Certiorari to the Colorado Supreme Court is dated August 28, 2006, and is printed at Appendix to Petition, "C".

## JURISDICTION

The Colorado Court of Appeals entered its judgment on March 28, 2006, and denied a petition for rehearing on June 1, 2006, and the Colorado Supreme Court denied Petition for Writ of Certiorari on August 28, 2006. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. § 1257, Article III, and Amendments VII and XIV of the United States Constitution.

## STATUTES INVOLVED

There are no federal statutes involved in this Petition for Writ of Certiorari. The statutes of the State of Colorado which ensured a jury pursuant to Amendments VII and XIV of the United States Constitution are C.R.S. 13-71-103 (jury in civil cases shall consist of six persons, unless parties agree to a smaller number, which shall be not less than three), is printed at Appendix to Petition, "D"; C.R.S.

13-71-142 (providing for discharge of alternate jurors), is printed at Appendix to Petition, "E".

## STATEMENT OF THE CASE

In a personal injury action arising out of an automobile accident in which the jury found the driver of Respondent's vehicle negligent, the jury determined that Petitioners had not incurred damages as a result of that negligence, in spite of overwhelming evidence to the contrary. Petitioner Robama Abed is an American by birth of Palestinian descent. His father was a member of the United States Armed Forces during World War I. Because he came' to this country as an adult he has a highly noticeable Arabic accent. Petitioner Mary Abed is an American citizen of Hispanic descent. Petitioners have contended throughout all proceedings challenging the jury verdict, that the verdict was the result of prejudice, passion and discrimination due to their ancestry.

However, that is not the basis upon which jurisdiction of this Court is invoked. The District Court of the City and County of Denver, Colorado, the trial court, submitted the case to a seven person jury including the alternate juror in violation of the statutes of the State of Colorado, and in violation of the provisions of Amendments VII and XIV of the Constitution of the United States. The jury verdict is printed as Appendix to Petition, "G".

In all the State courts the Petitioners raised the issue of the violation of Amendments VII and XIV of the Constitution of the United States by the trial court allowing the alternate juror, a stranger in the jury room, to participate in rendering the verdict in this case. In the state trial

court the issue was raised by a motion for judgment notwithstanding the verdict or for new trial. The issue was raised in the Colorado Court of Appeals on appeal by the Notice of Appeal, in the Opening Brief of Petitioners in that Court, in the Reply Brief of Petitioners in that Court, and in the Petition for Rehearing filed by Petitioners in that Court. The Colorado Court of Appeals affirmed the judgment of the trial court denying the motion for judgment notwithstanding the verdict or for new trial stating that Petitioners "failed to object contemporaneously to the seventh juror's participation in the deliberations and in rendering the verdict." (Appendix p. 7). The affidavit of counsel for Petitioners states that Petitioners were not aware that the trial court submitted the case to a jury in which the alternate juror, who should have been discharged, had participated in the deliberations and in rendering the verdict. (Appendix pp. 13-18 inclusive). The issue was raised by Petitioners in their Petition For Writ of Certiorari filed in the Supreme Court of Colorado. That Court denied the Petition For Writ of Certiorari. (Appendix p. 9).

## REASONS FOR GRANTING THE PETITION

The Colorado Court of Appeals has decided an important question of United States Constitutional law that has not been, but should be, settled by the Supreme Court of the United States.

Aside from Petitioners' claim that the resulting verdict of an unconstitutional jury resulted in an unjust decision, the Colorado State Courts, the District Court of the City and County of Denver in its refusal to grant a

motion for judgment notwithstanding the verdict or for new trial, Colorado Court of Appeals in its decision to uphold th rdict of an unconstitutional jury, and the Colorado Supreme Court in its refusal to grant a Petition for Writ of Certiorari to correct the error of the lower state courts, have ignored a maxim of American jurisprudence that applies to all jury trials in every court, state and federal, that being that the sanctity of jury secrecy is paramount in every case.

Several courts have decided that a cardinal principle of jury trials, both civil and criminal, requires that jury deliberations shall remain private and secret in every case. *See United States v. Brown,* 823 F. 2d 591, (D.C. Cir. 1987), *United States v. Thomas*, 116 F. 3d 606 (2d Cir. 1997), and *United States v. Symington,* 195 F. 3d 1080 (9th Cir. 1999). While the courts in those cases were mainly concerned with the discharge of a juror after jury deliberations have commenced, each of those courts saw a paramount need to safeguard the secrecy of jury deliberations.

In *United States v. Virginia Erection Corp.,* 335 F. 2d 868, 872 (4th Cir. 1964), the Court said that the presence of the alternate juror in the jury room violated the cardinal principle that deliberations of the jury shall always be private and secret in every case. In *United States v. Beasley,* 464 F. 2d 468, 469-470 (10th Cir. 1972), the alternate juror went with the other jurors to the jury room and participated only in the selection of a jury foreman. That was enough for the appellate court to hold that a mistrial should have been granted. In so holding, the Court stated that the alternate juror was like any other stranger to the proceedings, and her presence destroyed the sanctity of the jury deliberations. In *United States v. Olano,* 507 U.S. 725, 743 (1993), Justice Stevens in his

dissenting opinion also stated that it is a cardinal principle of jury proceedings that jury deliberations shall remain private and secret in every case. That principle applies to every case not just criminal cases.

Petitioners are aware that the above cases all involve the provisions of Rules 23 and 24 of the Federal Rules of Criminal Procedure. However, Petitioners would offer this thought for this Court's consideration. Any error that calls into question the integrity of the jury, whether in a criminal case or a civil case, undermines and harms the jury system. The Colorado Supreme Court has recognized the maxim stated in the cases cited above in two criminal cases. *People v. Boulies,* 690 P. 2d 1253 (Colo. 1984), and *People v. Burnette,* 775 P. 2d 583 (Colo. 1989). The only Colorado civil case involving the question presented in this Petition is *Walford v. Blinder, Robinson & Co., Inc.,* 739 P. 2d 620 (Colo. App. 1990), but in that case there was a stipulation by the parties that the case be submitted to a jury of seven jurors. To the contrary, there was no stipulation in this case, and Petitioner's, counsel was not aware that the seventh juror had participated in rendering the verdict. (Appendix, pp. 13-18 incl.). In any event, such a waiver would have to be knowingly and intentionally done. *National Equipment Rental v. Hendrix,* 565 F. 2d 255 (2d Cir. 1977).

Without consideration of Amendment VII, the State Courts violated Petitioners' right to equal protection of the law under the XIV Amendment. The two state statutes mentioned above and included in the appendix clearly prove that Colorado provides for a jury of six persons in civil trials and not seven, and that the alternate juror shall be discharged before the case is submitted to the jury for deliberation and verdict. The fact that the only reported case

involving the alternate juror in a civil jury trial, is the one cited above, clearly shows that Colorado courts enforce the statutory provision requiring the discharge of the alternate juror in all civil trials. This clearly shows that Petitioners did not receive equal protection of the law as required by the XIV Amendment.

Regarding the application of Amendment VII to this case, petitioners are aware of many cases which have held that the Supreme Court of the United States has held in many cases that the Amendment VII does not apply to state courts but only to jury trials in the courts of the United States. *Pearson v. Yewdall,* 95 U.S. 294, 5 Otto 289, 24 L. Ed. 436 (1877). The Court at one time also stated that the first eight amendments to the Constitution of the United States do not apply to the States. See *Lloyd v. Denison,* 194 U.S. 445, 24 5. Ct. 703, 48 L. Ed. 1062 (1904). The Court has been willing to overrule those well established authorities from time to time. See *Mapp v. Ohio,* 367 U.S. 643 (1961),[1] *Gideon v. Wainwright,* 372 U.S. 335 (1963).[2] The law of the decisions that have held that the Seventh Amendment, does not apply to the States through the Fourteenth Amendment is not immutable, as is shown by the two examples given here.

However, it is not even necessary for the Court to reach the question of the Seventh Amendment's application to state jury trials. The real question is whether it is

---

[1] Held that the Fourth Amendment was now fully applicable to the states, overruling previous decisions to the contrary.

[2] Held that the provisions of the Sixth Amendment regarding assistance of counsel in criminal cases applied to the states, and that the states were required to appoint attorneys to represent indigent defendants in criminal cases.

fundamental error of a constitutional dimension under the Fourteenth Amendment for a state court to permit an alternate juror in a civil jury trial to deliberate with the entity that is the jury[3], without the express consent of the parties. It is imperative that this issue be decided by this Court to give guidance to all the states' courts.

## CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ROBAMA ABED, Petitioner, Pro Se
MARY ABED, Petitioner, Pro Se
3893 South Quince Street
Denver, CO 80237

[3] A jury composed of the number of persons provided by statute or other law of the state.

**APPENDIX "A"**

COLORADO COURT OF APPEALS

---

Court of Appeals No.: 04CA1268
City and County of Denver District Court No. 02CV4629
Honorable J. Stephen Phillips, Judge

---

Robama Abed and Mary Abed,

Plaintiffs-Appellants,

v.

Mary K. Higgins, as independent executrix of the Estate of J. Marlon Higgins a/k/a, James M. Higgins, Rusty Higgins, and James Marlon Higgins,

Defendant-Appellee.

---

JUDGMENT AFFIRMED

Division V
Opinion by: JUDGE HAWTHORNE
Webb and Russel, JJ., concur

**NOT PUBLISHED PURSUANT TO C.A.R. 35(f)**
Announced: March 30, 2006

---

Remigio Pete Reyes, Denver, Colorado, for Plaintiffs-Appellants

George D. Browning & Associates, James A. Corman, Westminster, Colorado, for Defendant-Appellee

In this personal injury action, plaintiffs, Robama Abed and Mary Abed, appeal the trial court's judgment entered on a jury verdict that found defendant, Mary Higgins, as the independent executrix of the estate of J. Marlon

Higgins (decedent), not liable for plaintiffs' medical expenses. We affirm.

## I. Background

In April 2000, the Abeds and the decedent were involved in a car accident. The Abeds brought a claim for personal injuries against the decedent's estate. After a trial, the jury determined that the decedent was negligent, but that the Abeds' injuries were not caused by the accident. Thus, the jury determined that because the decedent did not cause the Abeds' injuries, the amount of damages they sustained did not exceed the $2500 threshold set forth in the former No-Fault Act, Colo. Sess. Laws 1992, ch. 220, § 10-4-714 at 1786-87, in effect at the time of the accident.

The Abeds moved for judgment notwithstanding the verdict and for a new trial. The trial court denied the motion, and this appeal followed.

## II. Sufficiency of the Evidence

The Abeds contend the trial court erred in not setting aside the verdict because it was not supported by sufficient evidence. Specifically, the Abeds contend undisputed evidence established that each of them sustained damages in excess of the $2500 threshold. We disagree.

In reviewing a claim of insufficient evidence, we view the evidence in the light most favorable to the party seeking to sustain the judgment. If there is any evidentiary basis to support the verdict, we will not disturb it on appeal. *Pearson v. Kancilia*, 70 P.3d 594 (Colo. App. 2003).

At trial, Mary Abed testified that she suffered injuries to her neck, chest and arms because of the accident. Robama Abed testified that he suffered injuries to his neck, wrist and hands. The Abeds then presented evidence that their no-fault insurance carrier paid approximately $9000 in medical expenses based on its conclusion that those expenses were reasonable and necessary.

However, Higgins presented substantial evidence that both Mary Abed and Robama Abed had pre-existing injuries.

On cross-examination, defense counsel asked Mary Abed whether she had suffered any prior neck problems. She replied "no." Counsel then asked her whether she had been involved in any prior car accidents. She stated she had been involved in an accident in the eighties, but could not remember what injuries she had suffered. Counsel asked her whether she had been involved in a car accident in 1993, to which she replied "no." Counsel then produced a medical record which stated that Mary Abed had been involved in a car accident in June 1993, had complained of "neck pain," and was "referred to trauma." Nevertheless, she denied that she remembered being in a car accident in 1993. Defense counsel also presented a medical record establishing that in February 2000, approximately two months prior to the accident at issue in this case, she had complained to her primary doctor of neck pain.

Regarding Robama Abed's injuries, defense counsel asked him whether he had had any treatment for problems with his hands prior to the accident. He replied, "It could be on my hand one time maybe, yes." Defense counsel asked him what was wrong with his hands, and he

replied, "I don't remember even. . . . Maybe I push it or something. I can't remember, really."

Defense counsel then presented a medical record which stated that in 1998, Robama Abed had been to the doctor and "request[ed] ortho referral for continuous thumb pain and swelling. Previously seen in trauma, and was told by provider he may need surgery." Nevertheless, Robama Abed stated, "[I] never heard that . . . need surgery on my thumb, I never on my thumb."

Defense counsel also presented expert testimony that one of Robama Abed's alleged injuries, an epidural abscess, was not "in any way related" to the car accident.

Viewing the evidence in the light most favorable to Higgins, we conclude there was ample evidence presented to support a jury finding that the car accident did not cause the Abeds to suffer injuries in excess of the $2500 threshold. *See Pearson, supra.* Accordingly, the trial court properly refused to set aside the jury's verdict.

## III. Passion, Prejudice, or Bias

The Abeds contend the trial court erred in denying their motion for a new trial because the jury's verdict was based on passion, prejudice, or bias. We disagree.

Whether to grant a motion for a new trial is within the discretion of the trial court. *Middleton v. Beckett*, 960 P.2d 1213 (Colo. App. 1998). However, a trial court must grant a new trial if it finds that passion, prejudice, or bias has influenced the verdict. *Burns v. McGraw-Hill Broad. Co.*, 659 P.2d 1351 (Colo. 1983).

The Abeds allege the jury was confused during deliberations because one juror wrote a note to the court that stated, "Were the injuries caused by the accident?" and then drew an arrow figure to a dollar amount of $2500. However, CRE 606(b) prohibits the trial court's consideration of "juror testimony or affidavits divulging juror deliberations, thought processes, confusion, mistake, intent, or other verdict impeaching grounds." *Stewart v. Rice*, 47 P.3d 316, 322 (Colo. 2002). Thus, we decline to consider the juror's note as evidence of any possible passion, prejudice or bias.

The Abeds further contend the trial court erred in denying their motion for a new trial because the jury was biased against them based on their Arab ethnicity.

The Abeds' argument consists solely of that conclusory statement. They have not presented any evidence to support such a bias, and therefore, we conclude the trial court properly refused to grant a new trial on that basis. *See Middleton, supra.*

## IV. Instruction on Statutory Threshold

The Abeds contend the trial court erred by instructing the jury that it must find that their damages met the no-fault threshold requirement. We disagree.

The No-Fault Act modified the common law right to recover damages for injuries sustained in car accidents. *Pinell v. McCrary*, 849 P.2d 848 (Colo. App. 192). Former § 10-4-714(1) of the Act provided in relevant part:

> No person . . . shall be allowed to recover against an owner, user, or operator of a motor vehicle . . .

> except in those cases in which there has been caused by a motor vehicle accident:
>
> (a) Death;
> (b) Dismemberment;
> (c) Permanent disability;
> (d) Permanent disfigurement; [or]
> (e) Reasonable need for services . . . having a reasonable value in excess of two thousand five hundred dollars. . . .

That statutory threshold was an "essential condition of a plaintiff's right to recover damages in a negligence action." *Pinell, supra*, 849 P.2d at 850. Whether a plaintiff met the statutory threshold was a question of fact for the jury. *Pinell, supra*.

As noted in the foregoing discussion, the evidence regarding whether the decedent caused the Abeds' injuries was in conflict. Therefore, whether the Abeds had sustained damages caused by the decedent that satisfied the statutory threshold was a factual question for the jury. *See Pinell, supra*.

Accordingly, there was no error in submitting that issue to the jury.

## V. Instruction on Liability

The Abeds contend the trial court erred by instructing the jury on the issue of the decedent's liability because there was overwhelming evidence presented that the decedent's negligent driving was the sole cause of the accident. However, the jury ruled in the Abed's favor by determining that the decedent negligently caused the action. Accordingly, that issue is moot. *See A.O. Smith Harvestore Prods., Inc. v. Kallsen*, 817 P.2d 1038 (Colo.

1991) (court declines to address any issue the resolution of which is unnecessary to the disposition of the appeal).

VI. Right to a Fair and Impartial Jury

The Abeds contend the trial court violated their constitutional right to a jury trial by allowing the case to be decided by seven jurors instead of six.

However, the Abeds failed to object contemporaneously to the seventh juror's participation in the deliberations and in rendering the verdict. Accordingly, the Abeds waived any error that may have occurred. *See generally Gorsich v. Double B Trading Co.*, 893 P.2d 1357, 1364 (Colo. App. 1994) (where defendants did not tender any instructions or special interrogatories asking the jury to apportion liability for the claims, they waived any error that may have occurred).

The judgment is affirmed.

JUDGE WEBB and JUDGE RUSSEL concur.

**APPENDIX "B"**

---

COLORADO COURT OF APPEALS June 01, 2006

No. 04CA1268 ORDER DENYING PETITION FOR REHEARING

---

ROBAMA ABED, MARY ABED,
PLAINTIFF-APPELLANT
v.
MARY K. HIGGINS, AS INDEPENDENT EXECUTRIX OF, THE ESTATE OF J MARLON HIGGINS, ALSO KNOWN AS JAMES M HIGGINS, RUSTY HIGGINS AND JAMES, MARLON HIGGINS, DEFENDANT-APPELLEE

---

Appeal from the DENVER DISTRICT CIVIL COURT
Honorable J STEPHEN PHILLIPS, Judge
No. 02CV4629

---

The PETITION FOR REHEARING filed in this appeal by:

ROBAMA ABED/PLAINTIFF-APPELLANT

is DENIED.

Issuance of the Mandate is stayed until: July 03, 2006

If a Petition for Certiorari is timely filed with the Supreme Court of Colorado, then the stay shall remain in effect until disposition of the cause by that Court.

By the Court:

WEBB, J.
RUSSEL, J.
HAWTHORNE, J.

---

**APPENDIX "C"**

| SUPREME COURT, STATE OF COLORADO<br>TWO EAST 14TH AVENUE<br>DENVER, COLORADO 80203<br><br>CERTIORARI TO THE COURT OF APPEALS, 04CA1268<br>DISTRICT COURT, CITY AND COUNTY OF DENVER, 02CV4629 | CASE NO. 06SC422 |
|---|---|
| **Petitioners:**<br><br>ROBAMA ABED and MARY ABED,<br><br>v.<br><br>**Respondent:**<br><br>MARY K. HIGGINS, an independent Executrix of the Estate of J. Marlon Higgins a/k/a James M. Higgins, Rusty Higgins, and James Marlon Higgins. | |
| **ORDER OF COURT** | |

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, AUGUST 28, 2006.

[SEAL]

Copies mailed via the State's Mail Services Division on 08/28/06. MLK

Roger Cisneros
6426 S. Quebec St.
Centennial, CO 80111

James M. Corman
George D. Browning
& Associates
11080 Circle Point, Ste. 400
Westminster, CO 80020

Clerk of the Court
Colorado Court of Appeals

Clerk of the District Court
City & County Building
1437 Bannock, Rm. 256
Denver, CO 80202

Honorable J. Stephen Phillips
City & County Building
1437 Bannock, Rm. 256
Denver, CO 80202

## APPENDIX "D"

**C.R.S. 13-71-103. Number of trial jurors.** A jury in civil cases shall consist of six persons, unless the parties agree to a smaller number, which shall be not less than three.

## APPENDIX "E"

**C.R.S. 13-71-142. Alternate jurors.** In all civil and criminal trials, the court may call and impanel alternate jurors to replace jurors who are disqualified or who the court may determine are unable to perform their duties prior to deliberation. Alternate jurors shall be summoned in the same manner, have the same qualifications, be subject to the same examination and challenges, take the same oath, and have the same functions, powers, and privileges as regular jurors. An alternate juror who does not replace a regular juror shall be discharged at the time the jury retires to consider its verdict, unless otherwise provided by law, by agreement of the parties, or by order of the court. The seating of an alternate juror entitles each party to an additional peremptory challenge, which may be exercised as to any prospective jurors.

**APPENDIX "F"**

DISTRICT COURT, CITY AND
COUNTY OF DENVER, COLORADO

Court Address: 1437 Bannock Street
Denver, CO 80202

Plaintiffs: Robama Abed and
Mary Abed

Defendant: Mary K. Higgins as Independent Executrix of the Estate of J. Marlon Higgins also known as James M. Higgins, Rusty Higgins and James Marlon Higgins.

**FOR COURT USE ONLY**

Attorney for Plaintiffs:
Remigio Pete Reyes
1516 Xavier Street, Suite 400
Denver, Colorado 80204
(303) 534-7795
FAX No. (303) 534-7796
Attorney Registration: 5401

CASE NO.
02-CV-4269

COURTROOM 8

**MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON THE ISSUE OF LIABILITY AND SUBMIT THE CARE TO A JURY ON THE ISSUE OF DAMAGES ONLY, OR IN THE ALTERNATIVE THAT THE COURT GRANT A NEW TRIAL ON ALL ISSUES**

(Filed Mar. 24, 2004)

Pursuant to Rule 59 C.R.C.P. the plaintiffs, Robama Abed and Mary Abed, by their attorney, Remigio Pete Reyes, move that the Court set aside the jury verdict, grant judgment notwithstanding the verdict in favor of

plaintiffs on the issue of liability, and that the case be submitted to a jury on the issue of damages only. In the alternative plaintiffs move for a new trial on all issues.

AS GROUNDS FOR THIS MOTION, the plaintiffs state as follow:

1. The verdict is against the weight of the evidence.

2. The verdict is so manifestly against the weight of the evidence as to result in a miscarriage of justice.

3. The verdict was the result of confusion, passion, prejudice or bias.

4. The Court erred in submitting the issue of liability to the jury.

5. The Court erred in submitting the issue of whether or nor the plaintiffs had met the threshold requirement of 2000 C.R.S. 10-4-714.

6. The Court erred in submitting the case to be decided by a jury of seven.

In support of their motion the plaintiff submit herewith a Brief in support thereof with attachments thereto.

WHEREFORE, plaintiffs pray that the Court grant relief from the verdict as requested herein pursuant to the provisions of Rule 59, C.R.C.P.

/s/ Remigio Pete Reyes
Remigio Pete Reyes 5401
Attorney for Plaintiffs

**CERTIFICATE OF SERVICE**

I hereby certify that on the 24th day of March 2004, I served a copy of the above

**MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON THE ISSUE OF LIABILITY AND SUBMIT THE CARE TO A JURY ON THE ISSUE OF DAMAGES ONLY, OR IN THE ALTERNATIVE THAT THE COURT GRANT A NEW TRIAL ON ALL ISSUES**

upon the following:

James A. Corman, Esq.
George D. Browning & Associates
Attorneys at Law
11080 Circle Point
Suite 400
Westminster, CO 80020

by United States Mail, postage prepaid.

/s/ Levi Martinez

**APPENDIX "G"**

DISTRICT COURT, CITY AND COUNTY OF DENVER

Court Address: 1437 Bannock Street
Denver, CO 80202

Plaintiffs: Robama Abed and Mary Abed

v.

Defendant: Mary K. Higgins as Independent Executrix of the Estate of J. Marlon Higgins also known as James M. Higgins, Rusty Higgins and James Marlon Higgins.

**FOR COURT USE ONLY**

Attorney for Plaintiffs:
Remigio Pete Reyes
1516 Xavier Street, Suite 400
Denver, CO 80204
Phone No. (303) 534-7795
FAX (303) 534-7796
Attorney Registration No. 5401

CASE NO. 02-CV-4269

Courtroom 8

**AFFIDAVIT OF REMIGIO PETE REYES**

State of Colorado )
) ss.
City and County of Denver )

REMIGIO PETE REYES, of lawful age, being first duly sworn, upon his oath states as follows:

1. I am the attorney for the plaintiffs in the above entitled action, and was counsel who tried the case to a jury.

2. At the conclusion of the case, after the jury had been discharged, several papers were brought to me, and

as the Court was declaring the Court in recess I inquired what to do with the material which hiad been brought to me, and the Court stated that I should keep it. The copy of Instruction 7 was among those papers.

3. When the jury was impanneled I assumed that the 7th juror, Cathleen Cox, the last name read by the Court, was to be an alternate juror. (See Reporter's Transcript, p. 37, Lines 19-22), copy attached hereto and incorporated hereto and incorporated herein by reference.)

4. Just before the jury retired to deliberate I became concerned that some exhibits might not be in the jury's hands, and I addressed that issue. Because of my preoccupation with that matter I was not aware that the seventh alternate juror was not discharged.

5. I became aware that the seventh alternate juror had participated in deciding the case when the jury returned to the courtroom with a verdict. At that time I did not speak on the issue because I was not sure what the law provided.

Further affiant sayeth not.

/s/ Remigio Pete Reyes
Remigio Pete Reyes

Sworn and subscribed to before me this 1st day of June 2004.

Witness my hand and official seal.

My commission expires 10/24/07.

/s/ Natalie J. Olson
NOTARY PUBLIC

[SEAL]

**APPENDIX "H"**

DISTRICT COURT, CITY & COUNTY OF DENVER, COLORADO

Case No. 02-CV-4629 Division 8

---

REPORTER'S TRANSCRIPT

---

ROBAMA ABED and MARY ABED,

Plaintiffs,

vs.

MARY K. HIGGINS, as independent executrix of the Estate of J. Marlon Higgins, a/k/a James M. Higgins, Rusty Higgins, and James Marlon Higgins,

Defendant.

---

The Hearing in this matter commenced December 8, 2003 before the HONORABLE J. STEPHEN PHILLIPS, District Court Judge, in Division 8 of the Denver District Court, 1437 Bannock Street, Denver, Colorado 80112.

The following is a transcript of the proceedings in this matter.

APPEARANCES:

For the Plaintiff: Mr. Remiglio Reyes
Attorney at Law
1516 Xavier Street
Suite 410
Denver, CO 80204

* * *

one another. We need you to stay in place though, we only have a name association by use of this chart, without that we are lost.

The rest of you, I would get out, if I was you. The jury commissioner sometimes calls down and says, we need more bodies, so the people that haven't been called up, I would be getting out of the building before she does.

Thank you very much. Even though we didn't call you forward, we can't do this process without you, having you available.

(Discussion off the record.)

THE COURT: Okay, since it is a short list, let me read the names of the people who are staying with us. I want to thank those of you who are about to be excused, you are a nice, pleasant group, and you came back this afternoon, which we know was an extra inconvenience, not to get this done in the morning.

The following people are staying with us: Ryan Emshwiller, Rosa McClurg, Brenda Niave, Victorio Ornelas, Sally Staible, Dave Fitzpatrick, and Cathleen Cox.

Thank you, the rest of you, I want to thank you very much, and we would like to suggest you get out of here before she calls.

* * *

**APPENDIX "I"**

| DISTRICT COURT, COUNTY OF DENVER, COLORADO<br>Court Address:<br>1437 Bannock Street, Room 256<br>Denver, CO 80202 | ☐COURT USE ONLY☐ |
|---|---|
| **Plaintiffs:**<br>**Robama Abed and Mary Abed**<br>**Defendant:**<br>**Mary K. Higgins,**<br>**as Independent Executrix of the Estate of J. Marlon Higgins aka James M. Higgins, Rusty Higgins and James Marlon Higgins** | Case Number:<br>2002 CV 4629<br><br>Courtroom 8 |
| **VERDICT FORM** | |

We, the jury, present our Answers to Questions submitted by the Court, to which we have all agreed:

**As to the plaintiff Robama Abed:**

1. Did the plaintiff, Robama Abed, have injuries, damages and losses which exceeded the threshold in Instruction No. 7? (Yes or No)

ANSWER: No

2. Was James M. Higgins negligent? (Yes or No)

ANSWER: Yes

3. Was James M. Higgins' negligence, if any, a cause of any of the injuries, damages and losses claimed by the plaintiff, Robama Abed? (Yes or No)

ANSWER: No

* * *

amounts which you are instructed to exclude in Instruction 8. You should answer "0" if you determine there were none.

ANSWER: ___

c. What is the total amount of plaintiff Robama Abed's damages, if any, for physical impairment or disfigurement as in Paragraph No. 3 of Instruction No. 8? You should answer "0" if you determine there were none.

ANSWER: ___

**As to the plaintiff Mary Abed:**

1. Did the plaintiff Mary Abed, have injuries, damages and losses which exceeded the threshold in Instruction No. 7? (Yes or No)

ANSWER: No

2. Was James M. Higgins negligent? (Yes or No)

ANSWER: Yes

3. Was James M. Higgins' negligence, if any, a cause of any of the injuries, damages and losses claimed by the plaintiff, Mazy Abed? (Yes or No)

ANSWER: No

a. What is the total amount of Mary Abed's damages, if any, for noneconomic losses as defined in instruction number 9. You should answer "0" if you determine there were none.

ANSWER: $0.00

b. What is the total amount of plaintiff, Mary Abed's damages, if any, for loss of consortium

explained in Instruction No. 9. You should answer "0" if you determine there were none.

ANSWER: $0.00

Answer the following question 7 only if your answer to all five questions 1, 2, 3, 4, and 5 is "yes" for Robama Abed or to all three questions, "yes" for Mary Abed.

7. Taking as 100 percent the combined negligence of James M. Higgins and the plaintiff, Robama Abed, that caused the plaintiff Robama Abed's injuries, damages and losses, what percentage of the negligence was James M. Higgins' and what percentage was the plaintiff Robama Abed's?

ANSWER: ___

Percentage charged to James M. Higgins: ___%

Percentage charged to plaintiff, Robama Abed: ___%

**MUST TOTAL: 100%**

Signatures of all jurors:

/s/ Rosa L. McClurg

/s/ Dave Fitzpatrick
Foreperson

/s/ Sally Staible

/s/ Cathleen Cox

/s/ Ryan Emshwiller

/s/ Brenda Niave

/s/ Victorio Ornelas

No. 06-0695

FILED
DEC 18 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

# Supreme Court of the United States

ROBAMA ABED and MARY ABED,

*Petitioners,*

v.

MARY K. HIGGINS as Independent Executrix of the Estate of J. MARLON HIGGINS, also known as JAMES M. HIGGINS, RUSTY HIGGINS and JAMES MARLON HIGGINS,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Court Of Appeals For The State Of Colorado**

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES A. CORMAN,
*Counsel of Record*
GEORGE D. BROWNING & ASSOCIATES
11080 Circle Point, Suite 400
Westminster, CO 80020
(303) 657-2000

*Counsel for Respondent*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (307) 347-3445

## QUESTION PRESENTED

Whether the Colorado Courts violated the Petitioners' right to a jury trial by allowing a case to be decided by seven jurors instead of six when the Petitioners failed to object contemporaneously to the seventh juror's participation in the deliberations and the rendering of the verdict which constituted a waiver of any error that may have occurred?

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| TABLE OF CONTENTS | ii |
| TABLE OF AUTHORITIES | iv |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| STATUTES INVOLVED | 1 |
| STATEMENT OF THE CASE | 2 |
| REASONS THE PETITION SHOULD BE DENIED | 3 |
| I. THE SUPREME COURT LACKS JURISDICTION BECAUSE PETITIONERS WAIVED ANY ERROR THAT MAY HAVE OCCURRED BY FAILING TO OBJECT CONTEMPORANEOUSLY DURING THE TRIAL AS REQUIRED BY THE LAW OF THE STATE OF COLORADO | 3 |
| II. THE ISSUE PRESENTED BY THE PETITIONERS DOES NOT CONCERN A FEDERAL QUESTION, FEDERAL STATUTE OR THE U.S. CONSTITUTION | 5 |
| III. THE ISSUE PRESENTED BY PETITIONERS DOES NOT RISE TO THE LEVEL OF AN IMPORTANT NATIONAL QUESTION AND IS NOT OF GENERAL IMPORTANCE | 6 |
| IV. THE COLORADO COURTS HAVE HELD THAT JURIES IN CIVIL CASES IN COLORADO MAY INCLUDE SEVEN JURORS ALTHOUGH THE STATUTE ONLY REQUIRES SIX | 7 |

TABLE OF CONTENTS – Continued

Page

V. PETITIONERS EQUAL PROTECTION CLAIM IS COMPLETELY WITHOUT MERIT ..... 8

CONCLUSION ..... 8

## TABLE OF AUTHORITIES

Page

CASES

*Allis v. United States*, 155 U.S. 117 (1894) ..... 4

*City of Aurora v. Aurora Firefighters Protective Assoc.*, 566 P.2d 1356 (Colo. 1977) ..... 3

*Commercial Casualty Insurance Company v. Consolidated Stone Company*, 278 U.S. 177 (1929) ..... 4

*First Lutheran Mission v. Department of Revenue*, 613 P.2d 351 (Colo. App. 1980) ..... 3

*Ford v. United States*, 201 F.2d 300 (5th Cir. 1953) ..... 6

*Gorsich v. Double B Trading Co.*, 893 P.2d 1357 (Colo. App. 1994) ..... 3

*Matthews v. Tri-County Water Conservancy Dist.*, 613 P.2d 889 (Colo. 1980) ..... 3

*McNeely v. United States*, 353 F.2d 913 (8th Cir. 1965) ..... 4

*Middleton v. Becket*, 960 P.2d 1213 (Colo. App. 1998) ..... 7

*Pearson v. Yewdall*, 95 U.S. 294 (1877) ..... 5

*Pioneer Savings & Trust v. Ben-Showshan*, 826 P.2d 421 (Colo. App. 1992) ..... 3, 4

*Shannon v. Shaffer Oil & Refining Co., et al.*, 51 F.2d 878 (10th Cir. 1931) ..... 4

*Stewart v. Rice*, 47 P.3d 316 (Colo. 2002) ..... 7

*United States v. Atkinson*, 297 U.S. 157 (1936) ..... 4

*United States v. Dean*, 667 F.2d 729 (8th Cir. 1982) ..... 6

*United States v. United States Fidelity & Guaranty Company*, 236 U.S. 512 (1915) ..... 4

TABLE OF AUTHORITIES – Continued

Page

*Walford v. Blinder Robinson and Co., Inc.*, 793 P.2d 620 (Colo. App. 1990) ..... 7

*Weast v. County of Pierce*, 116 Fed. Appx. 80 (9th Cir. 2004) ..... 4

OTHER AUTHORITIES

Colorado Rules of Evidence C.R.E. Rule 606(b) ..... 6

Colorado Sessions Laws 1992, Chapter 220, Section 10-4-714 at 1786-87 ..... 2

C.R.S. §13-71-103 ..... 7

C.R.S. §13-71-142 ..... 7, 8

## OPINIONS BELOW

The Colorado Court of Appeals affirmed the judgment of the District Court of the City and County of Denver in Case No. 02CV4629 in an unpublished opinion announced on March 30, 2006, holding in part that the Petitioners waived any error that may have occurred in allowing the case to be decided by seven jurors instead of six by failing to contemporaneously object to the seventh juror's participation in deliberations and in the rendering of the verdict. Appendix A to Petition for Writ of Certiorari. The Colorado Court of Appeals denied Petitioners' Petition for Rehearing on June 1, 2006. Appendix B to Petition for Writ of Certiorari. The Colorado Supreme Court denied Petitioner's Petition for Writ of Certiorari on August 28, 2006. Appendix C to Petition for Writ of Certiorari.

## JURISDICTION

The United States Supreme Court lacks jurisdiction over this matter because the Colorado Court of Appeals' decision that Petitioners waived any error that may have occurred in allowing the case to be decided by seven jurors instead of six rests on independent and adequate state law grounds over which the Supreme Court lacks jurisdiction.

## STATUTES INVOLVED

There are no federal statutes involved in this matter. The Colorado Court of Appeals based its decision on State of Colorado common law.

## STATEMENT OF THE CASE

Petitioners Robama Abed and Mary Abed have filed a Writ of Certiorari on the issue of whether the trial court erred in allowing the case to be decided by seven jurors instead of six as provided by statute even though the Petitioners failed to object contemporaneously to the seventh juror's participation in deliberations, and in rendering the verdict.

The trial of this personal injury action arose out of an automobile accident in which the driver of Respondent's vehicle was found negligent by the jury. However, the jury determined that Petitioners, Robama Abed and Mary Abed, did not sustain any injuries or damages caused by the Respondent's negligence. Appendix I of Petition for Writ of Certiorari. The jury therefore determined that because the decedent, Mr. James Higgins, did not cause the Petitioners' injuries, the amount of damages they sustained did not exceed the $2,500 threshold set forth in the former "no fault act," Colorado Sessions Laws 1992, Chapter 220, Section 10-4-714 at 1786-87 in effect at the time of the accident.

The trial court judge impaneled a jury of six and one alternate juror. This was clearly set forth in all the initial proceedings and during voir dire. The Plaintiffs made no objection to the participation of the seventh juror, the alternate juror, in participating in jury deliberations. In fact, the verdict form approved by counsel without objection provided for all seven jurors to deliberate in that there was a signature line for seven jurors. Petitioners' counsel made no objections to the verdict form during the trial. Petitioners failed to preserve this issue by failing to object to the participation of the alternate juror prior to

jury deliberations. Alternate jurors are often allowed to deliberate unless there is an objection by one of the parties. Petitioners clearly waived their right to raise this issue by failing to object at the time.

## REASONS THE PETITION SHOULD BE DENIED

### I. THE SUPREME COURT LACKS JURISDICTION BECAUSE PETITIONERS WAIVED ANY ERROR THAT MAY HAVE OCCURRED BY FAILING TO OBJECT CONTEMPORANEOUSLY DURING THE TRIAL AS REQUIRED BY THE LAW OF THE STATE OF COLORADO.

Although the Petitioners claim that the Colorado Courts violated their right to a jury trial as guaranteed by the United States Constitution, the Colorado Courts never reached that issue because the Petitioners failed to object contemporaneously at the time of trial to the seventh juror's participation in deliberations and in rendering the verdict. According to Colorado law, the Petitioners waived any error that may have occurred by failing to object. *Gorsich v. Double B Trading Co.*, 893 P.2d 1357, 1364 (Colo. App. 1994). Several Colorado cases have held that issues not presented to or considered by the trial court may not be raised for the first time on appeal. *Pioneer Savings & Trust v. Ben-Showshan*, 826 P.2d 421 (Colo. App. 1992), *First Lutheran Mission v. Department of Revenue*, 613 P.2d 351 (Colo. App. 1980), *Matthews v. Tri-County Water Conservancy Dist.*, 613 P.2d 889 (Colo. 1980), *City of Aurora v. Aurora Firefighters Protective Assoc.*, 566 P.2d 1356 (Colo. 1977).

The Petitioners admit that they failed to preserve or raise the issue at the trial of this matter. The question of whether the Petitioners' failure to object contemporaneously waived any error that may have occurred is a matter of state law and not subject to the jurisdiction of the United States Supreme Court. Colorado Supreme Court decisions are consistent with other State and Federal Courts, and the Supreme Court's decision, that unless an objection is presented to the trial court, the party is precluded from raising the question on appeal, and has waived any error that may have occurred. *Pioneer*, 826 P.2d 421.

It is a longstanding rule that parties must object and bring to the attention of the trial court error in order to raise those questions on appeal. *United States v. Atkinson*, 297 U.S. 157 (1936). See also *Allis v. United States*, 155 U.S. 117, 122 (1894), *Commercial Casualty Insurance Company v. Consolidated Stone Company*, 278 U.S. 177 (1929), *United States v. United States Fidelity & Guaranty Company*, 236 U.S. 512, 529 (1915), *Weast v. County of Pierce*, 116 Fed. Appx. 80, 83 (9th Cir. 2004), *McNeely v. United States*, 353 F.2d 913, 917 (8th Cir. 1965), *Shannon v. Shaffer Oil & Refining Co., et al.*, 51 F.2d 878, 880 (10th Cir. 1931). The Petitioners failed to raise and preserve the issue by objection at the trial. The facts are clear in this case that Petitioners failed to object to the deliberation of the alternate juror in this matter and, as such, have waived their right to assert any error that may have occurred.

Ignoring the general principle of trial law that one must object at trial would essentially give trial counsel a trump card to play at the conclusion of a case if the result is unsatisfactory. This longstanding and fundamental rule

that a party must object and bring to the Court's attention any error that has occurred or is about to occur to preserve that issue for appeal must be upheld.

The Colorado Court's rule that one must object at the trial court level in order to raise the issue on appeal absent specific jurisdictional errors is consistently upheld throughout the State and Federal courts. Because Petitioners failed to preserve the issue, the Supreme Court lacks jurisdiction of this matter.

## II. THE ISSUE PRESENTED BY THE PETITIONERS DOES NOT CONCERN A FEDERAL QUESTION, FEDERAL STATUTE OR THE U.S. CONSTITUTION.

As Petitioners concede in the Petition, Amendment VII to the United States Constitution does not apply to State courts. *Pearson v. Yewdall*, 95 U.S. 294 (1877). Furthermore, the question presented does not present an issue concerning a federal statute or an important federal question. As stated previously, the Colorado Court of Appeals based its decision on the fact that the Petitioners failed to preserve their argument by not raising the issue in the trial court. Although this fundamental rule is true throughout the courts of the United States, the Colorado Court of Appeals relied on Colorado common law in reaching their result.

## III. THE ISSUE PRESENTED BY PETITIONERS DOES NOT RISE TO THE LEVEL OF AN IMPORTANT NATIONAL QUESTION AND IS NOT OF GENERAL IMPORTANCE.

Even disregarding the fact that Petitioners failed to object in the court below to preserve the issue, the question of whether this case was properly tried before seven jurors instead of six, as provided by the Colorado statute, does not rise to the level of national importance. The Federal Courts have stated that failure to object to a procedural rule regarding the empaneling of a jury does not give one the right to raise that issue on appeal absent the showing of bias or prejudice. *United States v. Dean*, 667 F.2d 729, 733 n.5 (8th Cir. 1982) cited in *Ford v. United States*, 201 F.2d 300, 301 (5th Cir. 1953). The Petitioners in this case have not made any legitimate indication of prejudice or bias on the part of the jury.

Petitioners claim the jury's verdict was a result of passion, prejudice or bias due to their Arabic ancestry. The facts in this case do not support any conclusion of bias or prejudice on behalf of the jury. The only evidence presented at trial that the Petitioners were Arabic came from an emergency room report indicating that Mr. Abed spoke Arabic in the emergency room for treatment that occurred many months after the accident. Petitioners obtained notes from the jury following the trial and alleged that these notes showed jury bias. Clearly the notes did not show bias on their face and, as the Colorado Court of Appeals correctly held, the Colorado Rules of Evidence C.R.E. Rule 606(b) prohibits the trial court's consideration of "juror testimony or affidavits divulging juror

deliberations thought processes, confusion, mistake, intent or other verdict impeaching grounds." *Stewart v. Rice*, 47 P.3d 316, 322 (Colo. 2002). Petitioners' argument of bias consists solely of conclusory statements on behalf of the Petitioners. They have not presented any evidence to support such bias and, therefore, the Colorado Court of Appeals correctly upheld the trial court's discretion in refusing to grant a new trial on the basis of bias or prejudice. *Middleton v. Becket*, 960 P.2d 1213 (Colo. App. 1998).

## IV. THE COLORADO COURTS HAVE HELD THAT JURIES IN CIVIL CASES IN COLORADO MAY INCLUDE SEVEN JURORS ALTHOUGH THE STATUTE ONLY REQUIRES SIX.

Although the Colorado statute, C.R.S. §13-71-103 provides for six jurors in civil cases, alternate jurors are allowed and it is proper to allow the alternate juror to deliberate. C.R.S. §13-71-142 provides that the alternate juror may participate in the verdict if provided by law, agreed to by the parties, or ordered by the court.

The Colorado case of *Walford v. Blinder Robinson and Co., Inc.*, 793 P.2d 620 (Colo. App. 1990), found that it was proper for juries to consist of seven persons as opposed to six required by Colorado Statute, C.R.S. §13-71-142. In that case, there was a stipulation that the case be submitted to a jury of seven persons which included the alternate juror. The fact that seven jurors participated in rendering the verdict is not improper and, in fact, is allowed by Colorado law. However, as admitted by Petitioners, they failed to object to the seventh juror deliberating. As set forth in *Walford*, it is proper for the courts to allow the alternate juror to deliberate in Colorado. 793 P.2d 620.

## V. PETITIONERS EQUAL PROTECTION CLAIM IS COMPLETELY WITHOUT MERIT.

Petitioners have raised an Equal Protection claim to support their petition. However, Petitioners have failed to provide any evidence that they were treated differently than any other plaintiff. As provided for in C.R.S. §13-71-142 the statute clearly provides that a seventh juror may deliberate in all cases if provided by law, the parties agree, or the court orders. Neither the statute nor its application in this particular case gives rise to an Equal Protection argument. Clearly the Petitioners lack any Equal Protection argument in this case.

## CONCLUSION

Wherefore, based upon the foregoing arguments and authorities, Respondent respectfully requests the Court deny the Petition for Writ of Certiorari.

Dated: December 18, 2006.

Respectfully submitted,

JAMES A. CORMAN, ESQ.
GEORGE D. BROWNING & ASSOCIATES
11080 Circle Point, Suite 400
Westminster, Colorado 80020
(303) 657-2000

(3)

No. 06-0695

JAN 4 - 2007
OFFICE OF THE CLERK

In The
# Supreme Court of the United States

ROBAMA ABED and MARY ABED,

*Petitioners,*

v.

MARY K. HIGGINS as Independent Executrix of the Estate of J. MARLON HIGGINS, also known as JAMES M. HIGGINS, RUSTY HIGGINS and JAMES MARLON HIGGINS,

*Respondent.*

**On Petition For Writ Of Certiorari To The Court Of Appeals For The State Of Colorado**

## REPLY BRIEF OF PETITIONERS TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBAMA ABED, Pro Se
MARY ABED, Pro Se
*Petitioners*
3893 South Quince Street
Denver, CO 80237
(303) 770-4667

## QUESTION PRESENTED

Whether the Colorado Courts violated the Petitioners' right to a jury trial as provided by the rules of the common law and as guaranteed by the United States Constitution pursuant to Amendment VII and Amendment XIV, in that the Colorado Courts sanctioned the violation of jury secrecy by allowing an alternate juror, a stranger to the jury proceedings, to participate in reaching a verdict in which the Petitioners were plaintiffs and Respondent was defendant, and whether the lack of contemporaneous objection by Petitioners constituted a waiver of any error that occurred.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| STATUTES INVOLVED | 1 |
| STATEMENT OF THE CASE | 2 |
| REASONS FOR GRANTING THE PETITION | 2 |
| I. THE SUPREME COURT DOES HAVE JURISDICTION AND WAIVER OF A FUNDAMENTAL RIGHT MUST BE KNOWINGLY AND WILLINGLY MADE | 2 |
| II. THE QUESTION TO BE ANSWERED BY THE SUPREME COURT DOES PRESENT AN ISSUE INVOLVING THE UNITED STATES CONSTITUTION WHICH SHOULD BE RESOLVED TO GIVE GUIDANCE TO ALL LOWER COURTS, FEDERAL AND STATE | 3 |
| III. JURY SECRECY IS OF PARAMOUNT IMPORTANCE IN PRESERVING THE INTEGRITY OF THE JURY SYSTEM, AND AN ALTERNATE JUROR IS LIKE ANY OTHER STRANGER IN THE JURY ROOM | 4 |
| IV. COLORADO LAW ALLOWS FOR ALTERNATE JUROR PARTICIPATION IN JURY DELIBERATIONS WHEN PROVIDED BY LAW, AGREEMENT OF THE PARTIES OR BY ORDER OF THE COURT, AND NOT OTHERWISE | 4 |

TABLE OF CONTENTS – Continued

Page

V. PETITIONERS' EQUAL PROTECTION CLAIM IS PROVED BY THE FACT THAT ONLY ONE COLORADO APPELLATE CASE HAS INVOLVED THE ISSUE OF PARTICIPATION BY A SEVENTH JUROR ..... 5

CONCLUSION ..... 6

# TABLE OF AUTHORITIES

Page

CASES

Aetna Insurance Co. v. Kennedy Use of Bogash, 301 U.S. 389, 57 S.Ct. 809, 81 L. Ed. 1177 (1937) ..... 3

Gideon v. Wainwright, 372 U.S. 335 (1963) ..... 3

Hodges v. Easton, 106 U.S. 408, 1 S.Ct. 307, 16 Otto 408, 27 L. Ed. 169 (1882) ..... 2

Mapp v. Ohio, 367 U.S. 643 (1961) ..... 3

United States v. Beasley, 464 F.2d 468 (10th Cir. 1972) ..... 4

U.S. v. Robinson, 8 F.3d 418 (7th Cir. 1993) ..... 3

Walford v. Blinder, Robinson & Co., Inc., 739 P.2d 620 (Colo. App. 1990) ..... 5

CONSTITUTIONAL PROVISIONS

Amendment VII ..... 1, 4

Amendment XIV ..... 1, 6

COLORADO STATUTES

C.R.S. 13-71-103 ..... 1, 5

C.R.S. 13-71-142 ..... 2, 4, 5

## OPINIONS BELOW

The Unpublished Opinion of the Colorado Court of Appeals in that Court's Case No. 04CA1268, announced March 30, 2006, affirming the judgment of the District Court of the City and County of Denver, Colorado in Case No. 02 CV 4629 is printed at Appendix "A" to the Petition. Order denying Petition for Rehearing by the Colorado Court of Appeals, dated June 1, 2006, is printed at Appendix "B" to the Petition. Order denying Petition for Writ of Certiorari to the Colorado Supreme Court is dated August 28, 2006, and is printed at Appendix "C" to the Petition. The appendices are part of the Petition for Writ of Certiorari.

## JURISDICTION

The Respondent's statement of lack of jurisdiction is based on lack of contemporaneous objection by the Petitioners when the jury retired to consider the case. The affidavit of counsel for Petitioners (Appendix "G" to the Petition for Writ of Certiorari), explains the reason for lack of objection. Furthermore, waiver, when it occurs should be expressed on the record or in writing.

## STATUTES INVOLVED

There are no federal statutes involved in this Petition for Writ of Certiorari. The statutes of the State of Colorado which ensured a jury pursuant to the Seventh and Fourteenth Amendments of the United States Constitution are C.R.S. 13-71-103 (jury in civil cases shall consist of six persons, unless parties agree to a smaller number, which shall be not less than three), is printed at Appendix "D" to

the Petition; C.R.S. 13-71-142 (providing for discharge of alternate jurors), is printed at Appendix "E" to the Petition.

## STATEMENT OF THE CASE

Petitioners' Statement of the Case contained in the Petition for Writ of Certiorari is confined to the facts relevant to the question presented for review by the Supreme Court. The Respondent's Statement of the Case expands the statement beyond facts relevant to the question presented for review. The jury did determine that Respondent's driver's negligence did not cause Petitioners' injuries in spite of the overwhelming evidence to the contrary including medical evidence from Respondent's own medical experts.

## REASONS FOR GRANTING THE PETITION

### I. THE SUPREME COURT DOES HAVE JURISDICTION, AND WAIVER OF A FUNDAMENTAL RIGHT MUST BE KNOWINGLY AND WILLINGLY MADE.

The affidavit of attorney Remigio Pete Reyes, Petitioners' trial counsel, (Appendix "G" to the Petition for Writ of Certiorari), sufficiently answers the issue raised by Respondent in her Opposition Brief, that the Petitioners failed to object contemporaneously to the alternate juror participating in the jury deliberations. For two centuries the Supreme Court of the United States has held that trial by jury being a fundamental right, every reasonable presumption should be indulged against waiver. ***Hodges v. Easton***, 106 U.S. 408, 1 S.Ct. 307, 16 Otto 408, 27

L. Ed. 169 (1882), ***Aetna Insurance Co. v. Kennedy Use of Bogash***, 301 U.S. 389, 57 S.Ct. 809, 81 L. Ed. 1177 (1937). The waiver claimed by Respondent in her Opposition Brief did not occur because there is no claim by Respondent that such waiver was knowingly and voluntarily made. Waiver of a fundamental right occurs only when knowingly and voluntarily made. ***U.S. v. Robinson***, 8 F.3d 418 (7th Cir. 1993).

The issue that is before this Court was raised in the state courts and every level. The issue was not raised for the first time on appeal. It was raised in the trial court by a motion for new trial or for judgment notwithstanding the verdict. (Appendix "F" to the Petition for Writ of Certiorari, Item 6). It must also be remembered that the Court, not counsel, is in charge of the trial proceedings. If the Rule of Law which is so basic to American Jurisprudence applies at all, it must most definitely apply to the Courts.

## II. THE QUESTION TO BE ANSWERED BY THE SUPREME COURT DOES PRESENT AN ISSUE INVOLVING THE UNITED STATES CONSTITUTION WHICH SHOULD BE RESOLVED TO GIVE GUIDANCE TO ALL LOWER COURTS, FEDERAL AND STATE.

The Petitioners do not concede that Amendment VII does not apply to state courts. While the Supreme Court has been reluctant over time to apply the first Eight Amendments of the Constitution to the states, the Court has over time reversed itself with respect to the Fourth and Sixth Amendments. In view of the holdings in ***Mapp v. Ohio***, 367 U.S. 643 (1961), and ***Gideon v. Wainwright***, 372 U.S. 335 (1963), there is no logical reason why the Seventh Amendment should not be made applicable to

state court civil proceedings. The Seventh Amendment should not be relegated to orphan status among the first Eight Constitutional Amendments which provide fundamental rights to the people.

## III. JURY SECRECY IS OF PARAMOUNT IMPORTANCE IN PRESERVING THE INTEGRITY OF THE JURY SYSTEM, AND AN ALTERNATE JUROR IS LIKE ANY OTHER STRANGER IN THE JURY ROOM.

The cases cited by Petitioners in the Petition for Writ of Certiorari leave no doubt whatever of the importance of maintaining jury secrecy. The cases strongly support the principle that jury deliberations should remain private and secret in every case. There is no need to cite those cases here again. It is important to state that it is an affront to the sanctity of jury proceedings to entertain the notion the question presented in this Petition for Writ of Certiorari is not of general importance as stated by Respondent in her Opposition Brief. The very presence of the alternate juror in the jury room during deliberations is like the presence of any stranger, and destroys the sanctity of those deliberations. ***United States v. Beasley***, 464 F.2d 468, 469-470 (10th Cir. 1972).

## IV. COLORADO LAW ALLOWS FOR ALTERNATE JUROR PARTICIPATION IN JURY DELIBERATIONS WHEN PROVIDED BY LAW, AGREEMENT OF THE PARTIES OR BY ORDER OF THE COURT, AND NOT OTHERWISE.

The applicable Colorado statute, C.R.S. 13-71-142 (Appendix "E" to Petition for Writ of Certiorari) provides clearly that an alternate juror shall be discharged at the

time that the jury retires to consider its verdict, unless otherwise provided by law, by agreement of the parties, or by order of the court. When would participation by the alternate juror in jury deliberations be provided by law or by order of the court? That question is answered by the statute in the language which states: "An alternate juror who does not replace a regular juror shall be discharged at the time the jury retires to consider its verdict . . . " There is no claim in Respondent's Opposition Brief that there was agreement of parties, order of the court or a requirement of the law that the alternate juror participate in the jury deliberations in the instant case. In the one Colorado case where it was held that it was proper for the case to be submitted to a jury of seven, there was a stipulation to that effect by the parties. ***Walford v. Blinder, Robinson & Co., Inc.***, 739 P.2d 620 (Colo. App. 1990), cited by Petitioners and by Respondent. That case is quite distinct from the situation in the instant case.

## V. PETITIONERS' EQUAL PROTECTION CLAIM IS PROVED BY THE FACT THAT ONLY ONE COLORADO APPELLATE CASE HAS INVOLVED THE ISSUE OF PARTICIPATION BY A SEVENTH JUROR.

The very fact that the only Colorado appellate court case involving a seventh juror is the one cited above, shows that the Colorado courts enforce the relevant statutes requiring that juries consist of six jurors, not less than three, (C.R.S. 13-71-103), and that the alternate juror shall be discharged when the jury retires to consider the verdict. (C.R.S. 13-71-142). When the trial court in the instant case failed to discharge the alternate juror as the

Colorado courts do, then it violated Petitioners' equal protection rights under the Fourteenth Amendment. That can be the only logical conclusion from that evidence.

## CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ROBAMA ABED, Petitioner, Pro Se
MARY ABED, Petitioner, Pro Se
3893 South Quince Street
Denver, CO 80237
(303) 770-4667